UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HEARTLAND COCA-COLA BOTTLING COMPANY, LLC

and **Cases 14-CA-195320**

CARL JONES, AN INDIVIDUAL

Bradley A Fink, Esq.,
for the General Counsel
John Randolph Bode, Esq.,
for the Respondent.

DECISION

I. STATEMENT OF THE CASE[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried on August 31, 2017,[2] in St. Louis, Missouri. The primary dispute is over the suspension and subsequent discharge of chief union steward Carl Jones for his statements during a March 8 employee meeting. At this meeting, management asked employees to work on their day off as part of a plan to help the company get caught up with its order backlog, which would, in turn, reduce the amount of overtime employees would need to work. After management presented its plan, Jones spoke, and there is a dispute over what he said. Jones and other employees testified that he encouraged employees to volunteer to work to help themselves and the company, and that if the company's plan did not work and employees continued to work excessive overtime, then "fuck 'em." The company's witnesses testified that Jones went further and identified three members of management by name and individually said fuck them, as well. The company suspended and later discharged Jones, contending that his statements were highly offensive and in violation of a company rule (C-20) prohibiting misconduct which casts discredit upon the company's reputation and/or image, including, but not limited to, rudeness, disrespect to customers, and criticizing or degrading the company or its products. Later, during a grievance meeting over Jones' suspension and discharge, a manager allegedly stated that Jones was held to a higher standard because of his position as chief shop steward.

On March 22, Jones filed an unfair labor practice charge against Heartland Coca-Cola Bottling Company, LLC (Respondent). He later amended that charge on June 27. On June 30, the Regional Director for Region 14 of the National Labor Relations Board (the Board) issued a Complaint alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) when it suspended and later discharged Jones for engaging in statutorily protected activities. The General Counsel alleges that Jones was engaged in statutorily protected activity when he spoke, as the chief steward, during the March 8 meeting to urge

[1] Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "G.C. Exh" for General Counsel's Exhibit; "G.C Br." for General Counsel's brief; and "R. Br." for Respondent's brief.
[2] All dates refer to 2017, unless otherwise stated.

employees to volunteer to work on their day off, and that he did not lose the protection of the Act by his use of profanity. The Complaint further alleges that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad rule (C-20), and violated Section 8(a)(1) and (3) of the Act by interpreting that rule to suspend and discharge Jones for his protected activity during the March 8 meeting. The Complaint also alleges that Respondent violated Section 8(a)(1) of the Act by stating during the April 3 grievance meeting that union officials are held to a higher standard. Respondent filed an original and amended answer, denying the alleged violations.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following

II. FINDINGS OF FACT[3]

A. Jurisdiction

Since about February 25, Respondent has been a limited liability company with various offices and places of business in Kansas, Illinois, and Missouri, including a distribution center and warehouse located in St. Charles, Missouri, where it has been engaged in the production, storage, and distribution of Coca-Cola products. Since about February 25, Respondent, in conducting its operations, purchased and received at its various Missouri facilities, goods valued in excess of $50,000 directly from points outside the State of Missouri, and sold and shipped from its various Missouri facilities goods valued in excess of $50,000 directly to points outside the State of Missouri. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I, therefore, find this dispute affects commerce and the Board has jurisdiction, pursuant to Section 10(a) of the Act.

Respondent admits, and I find, that the following are supervisors and agents within the meaning of Sections 2(11) and (13) of the Act: Joe Quinn (Vice President, Market Unit Field Operations), Joe Willems (Distribution Center Manager), Brooke Randall (Warehouse Manager), Lance Gordon (Supervisor), Dave Compton (Supervisor), Clementine "Clemmy" Zerrer (Supervisor), and Scott Bedows (Chief Information Officer). Respondent further admits, and I find, that Jody Gregory (Labor Relations Business Partner) and Stephanie Duffy (Employee Relations Business Partner) are agents within the meaning of Section 2(13) of the Act. (Tr. 10-13).

B. ALLEGED UNFAIR LABOR PRACTICES

1. Background

Respondent, a beverage distribution company, acquired the St. Charles distribution center and warehouse from CCR, effective February 25, following an asset-purchase sale. Respondent hired all of the approximately 100 drivers and 100 warehouse employees, as well as the supervisors and managers, working at or out of the distribution center and warehouse.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

The drivers and warehouse employees are represented for purposes of collective bargaining by Teamsters Local Union No. 688, affiliated with the International Brotherhood of Teamsters (Union). Respondent immediately recognized the Union and began applying the terms of the collective-bargaining agreement, dated April 1, 2016 through March 31, 2021.

Carl Jones worked at the St. Charles location for 14 years, most recently as a driver. Jones is the chief Union steward at this location, an elected position he has held for two years. As the chief steward, Jones handles day-to-day labor-management issues and attends grievance meetings, two-man board meetings, and arbitrations. (Tr. 40-41)

2. Initial Transition Period

The first two weeks after Respondent assumed operation of the St. Charles distribution center and warehouse were chaotic. Initially, Respondent had issues with payroll, and some employees were being underpaid. Respondent attempted to resolve the matter by issuing paper checks to cover the difference, but certain employees were unable to cash those checks. Carl Jones notified management, and he later met with Distribution Center Manager Joe Willems and Vice President, Market Unit Field Operations Joe Quinn. Quinn informed Jones of a particular bank that would cash the checks. Jones later relayed that information to the employees. (Tr. 43-44).

Respondent also had issues implementing its order processing system. Generally speaking, the orders were not being communicated correctly, which resulted in errors and delays with the warehouse employees pulling and loading orders, which, in turn, led to errors and delays when the drivers made their deliveries to customers. Respondent quickly experienced a significant a backlog in its orders. (Tr. 45-47). Warehouse employees worked long hours trying to get caught up. Some worked 16-hour days and/or 80-hour weeks.

According to Article 25 (Hours of Work) of the parties' collective-bargaining agreement, if the company needs employees to work on their off days, it must post a notice on the Monday of the prior week soliciting volunteers to work. The posting remains up until Friday morning for employees to sign up. If not enough employees volunteer, the company can require employees to come into work, based on reverse seniority. But if the company fails to properly post for volunteers to sign up, it cannot mandate employees to work on their off days. Also, except under limited circumstances, Article 11 of the parties' agreement restricts the company from using outside employees to perform unit work. (Jt. Exh. 1).

3. March 8 Meeting

During the week of March 6, Respondent continued to have an order backlog, and it had failed to timely post for warehouse employees to volunteer to work mandatory overtime on their day off. (Tr. 48). On Tuesday, March 7, Distribution Center Manager Joe Willems approached Union steward Sam Brown about using temporary employees to help the company get caught up with the orders. (Tr. 48). Brown spoke with Carl Jones, and Jones told Brown the company could not do that. (Tr. 48)(Tr. 186-187). Later that day, Willems approached Jones about the backlog, and that the company needed warehouse employees to come in that Friday—an off day--to help the company get caught up. Jones told him the company could post a sign-up sheet to see if anyone volunteered to come in and work. (Tr. 49).

The following day, on March 8, Willems approached Jones and informed him that no one signed up to volunteer to work that Friday. Willems told Jones that, if necessary, the company

would bring in managers and merchandisers to work to get caught up, because they were too backed up. Jones told Willems that he should do what he had to do, but that they could try to get volunteers. (Tr. 49-50).

Later that day, Willems spoke with Union business representative John Becker about holding a meeting to ask the third-shift warehouse employees to volunteer to work on Friday, their off day, to help the company "reset." Becker agreed. Becker contacted Jones about the meeting, stating that Willems wanted Jones to stick around for the meeting and talk to the guys to try to get them to come in to work. Jones later returned to the facility after making his deliveries and saw Willems. Jones asked if Willems wanted him to stick around to talk to the guys, and Willems said "yes." (Tr. 50-51).

The meeting was scheduled for 7:30 p.m., which is the start of the third shift. Jones met with Becker and Willems before heading to the meeting. On their way to the meeting, Jones saw Union steward Sam Brown, who was finishing his shift. Jones approached Brown and said, "Hey Sam. Stick around. We're going to talk to the 7:30 crew." Willems told Brown that, "John [Becker] is going to say a few words. Carl's going to say a few words. Sam, you can add something." (Tr. 54-55) (Tr. 188). Brown eventually agreed to stay for the meeting.

The meeting occurred at the safety board, near the supervisors' office, at around 7:30 p.m. There were around 50 employees in attendance. They were arranged in a circle. Willems and Joe Quinn were present from management, along with Scott Bedows, Respondent's Chief Information Officer. Bedows works at Respondent's corporate offices, but he was at the St. Charles' facility trying to resolve the issues with the order processing system. Union business representative John Becker was present. Becker spoke briefly with the employees before the meeting began.

Willems began the meeting by asking those in attendance, by a show of hands, how many of them were tired. Everyone raised their hands. Willems then said, "Look guys, I get it. We're all fucking tired." (Tr. 264). Willems then said he was there to talk to the employees about a plan that had been developed, and that he had buy-in from the Union leadership as well, to get back to a normal operation. He used the term "reset." He then went on to explain the plan, which involved having crews come in to work on Friday, their day off, to help the company to get caught up on their order backlog. He added that if employees came in on Friday to work, and everyone gets back to their efficiency expectations, and there are no more system issues, the company should be back to where it needed to be. Warehouse Manager Brooke Randall and Supervisor Lance Gordon arrived to the meeting while Willems was speaking, and they stood near the circle. Willems concluded his speech by asking Becker, Jones, or Brown if they wanted to add anything. (Tr. 54-56)(Tr. 190).

Jones said, "Hey, guys. You know, I'm your chief shop steward, you know, and I think I probably should say something to you." He said, "Hey, guys. Damon had a problem with his paycheck. He couldn't get it cashed, but I worked with Joe and Joe, and we got the problem fixed." Jones then said, "See, guys, it's not the problem. It's how we fix it." He added, "Guys, look, we're all one company. We don't have to like Joe, Lance, Brooke, John Becker, but what you do like is to pay your car note, pay your house note, pay your mortgage." Jones then said, "Hey, guys, I need you to step up, and Friday I need you to sign up and come in." In reference to Willems earlier statement to Jones that he was going to bring in managers and merchandisers to do the work if there were not enough unit employees who volunteered, Jones said, "Hey, if Joe comes in and brings in the company guys, you're talking about 20,000 cases. They might get 9,000 racks done, and that's going to leave you 11,000 racks, which in terms –

on top of your normal day, you're going to be right back at [working] 16 hours [a day]." Jones concluded by saying, "Guys, if you come in, do your business, do what you need to do, and if they lie to you and you're still doing 16 hours, fuck 'em. Don't come in on your off day. Don't do any more favors." (Tr. 58-59)(Tr. 191-192).

Brooke Randall then asked Joe Willems whether it was appropriate for Jones to be saying that. Willems indicated to let Jones finish. Jones then turned around and apologized if he offended anyone, but that was how he spoke to his guys. Jones again said the company needed the employees to come in to work on Friday and that the employees should do it. (Tr. 60)(Tr. 191-192). That was the end of the meeting, and the employees went back to work.

After the meeting ended, Joe Quinn approached Jones and said he liked the speech, but "next time to try to find a way to do it without the F bomb." Jones responded, "Yeah, Joe. You're right, but I was just talking to my guys, trying to get them motivated." Sam Brown, who was nearby, stated that 10 guys had just signed up to volunteer to work on Friday. Prior to that, no one had signed up to work. Quinn then shook Jones's hand and said, "Good job, Carl. Hey, no F bomb next time." (Tr. 61)(Tr. 192).

While that conversation was occurring, Brooke Randall was having a conversation with Willems, and she was visibly upset with what Jones had said. Randall was telling Willems that Jones should be disciplined for what he said. Their conversation ended, and Willems walked over to Jones and Brown. Willems said to Jones, "Hey, Carl. I'm not going to be able to let you speak next time." Jones responded, "Hey, Joe, you know, all I was doing was motivating the guys, and I was just trying to get them to come in." Willems said, "Yeah, I know, but I took a bullet for you. My warehouse manager [Randall] is mad at me." (Tr. 62-63).

4. Suspension Meeting and Notification of Termination

The following day, on March 9, Jones was called into a meeting with Willems and others. Willems handed Jones a corrective action form stating that he was being suspended pending termination. (Jt. Exh. 2). The document stated that:

> C-20---Misconduct which casts discredit upon the company's reputation and/or image while on or off company time and/or in company uniform will not be tolerated. This would include, but not limited to, rudeness, disrespect to customers, and criticizing or degrading the company, its product or products before customers.
>
> On 3/5 at 7:30 PM, all 2nd and 3rd shift crew [warehouse] the associates were gathered for a meeting in which talks were provided by Joe Willems, John Becker, and Carl Jones. Carl Jones addressed the 2nd and 3rd shift [warehouse] associates. During this conversation, Carl stated F***Joe(Quinn), F***Joe(Willems), and F***Brooke(Randall). Carl stated to all employees that if the company didn't reset after they throw cases, then "F*** em. This situation created a hostile and provocative environment that pitted the Local 688 Union vs. the Management of Heartland, and created an environment that made the Manager and Supervisor feel degraded and threatened.
>
> This incident was witnessed by the Local 688 business agent (John Becker), CIO of Heartland Scott Bedows, the MUVP of Heartland Joe Quinn, the DCM of STL

> (Joe Willems), CONA team members, [warehouse] supervisors Lance, Megan, Reginald, and 2nd and 3rd crew [warehouse] Employees.

(Jt. Exh. 2).

After Jones reviewed the form, he told Willems that it was not true, and refused to sign it.

Respondent later discharged Jones on around March 24 for his statements during the March 8 meeting. (Tr. 67).

5. April 3rd Grievance Meeting

The Union filed grievances over Jones' suspension and discharge. (Jt. Exh. 3-5). On April 3, there was a grievance meeting. Willems and Supervisor Clemmy Zerrer were present for Respondent. Respondents' Labor Relations Business Partner Jody Gregory participated by phone. John Becker, Mike Austill, and Lamark Thompson were present for the Union, along with Jones. Willems spoke and explained why Respondent viewed Jones' statements during the March 8 meeting to be inappropriate. Willems added that Jones, as the elected chief steward, was being held to a higher standard and that he needed to conduct himself in a different way. (Tr. 195-196)(Tr. 203)(Tr. 207-208)(Tr. 247).

Following the grievance meeting, the grievances were presented to the two-person adjustment board. On May 8, 2017, the two-person adjustment board determined that Jones should be reinstated without back pay or benefits and under a last chance agreement. However, Jones refused to return to work under those terms.

III. WITNESS CREDIBILITY

There are critical conflicts in testimony between the General Counsel's witnesses and Respondent's witnesses regarding the March 8 employee meeting and the April 3 grievance meeting.[4] To resolve these conflicts, I must make determinations on the credibility of the witnesses. Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, corroboration, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622. See also *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). My credibility findings are generally incorporated into the findings of fact set forth above.

My overall observation was that the General Counsel's witnesses each appeared sincere and honest in their demeanor, and they testified in a consistent, convincing, and

[4] The General Counsel called Carl Jones, Anthony Washington, Ray Lampkins, Ekunno Thomas, Randy Lacy, Willie Neal, Samuel Brown, Lamark Thompson, Dennis Donaby, Gary Finley, Curtis Vitale, and Michael Austill. Respondent called Joe Willems, Joe Quinn, Scott Bedows, Clementine 'Clemmy" Zerrer, David Compton, and Brooke Randall.

straightforward manner based on their independent recollection of what was said.[5] While there were certain, minor inconsistencies, they largely corroborated one another. Moreover, except for Jones, each of the General Counsel's witnesses remained employed by Respondent as of the hearing. The Board has held that where current employees provide testimony against the interests of their employer, and thus contrary to their own pecuniary interests, such testimony is entitled to additional weight when credited. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); *PPG Aerospace Industries, Inc.*, 353 NLRB 223 (2008); *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006).

In contrast, I found Respondent's witnesses to be less sincere and honest in their demeanor. I also did not find their testimony to be consistent or supported by rest of the record evidence. As stated below, at critical points, I find they testified based upon their impressions of what was said, as opposed to what was actually said. Consequently, where their testimonies conflict, I credit the General Counsel's witnesses over Respondent's witnesses.

The first credibility dispute is whether Jones said "fuck Joe [Willems], fuck Joe [Quinn], and fuck Brooke [Randall]" during the March 8 meeting. General Counsel presented several witnesses who were at this meeting, and each gave his independent recollection of what was said. There were minor inconsistencies in their recollections, but all testified that Jones urged employees to volunteer to help themselves and to help the company address the backlog and the overtime, and that if the company's plan did not work to address these issues, then "fuck 'em." Each was then directly asked whether Jones said "fuck Joe [Willems], fuck Joe [Quinn], and fuck Brooke [Randall]", or anything like it, and each said he did not.[6]

In contrast, Distribution Center Manager Joe Willems, Vice President, Market Unit Field Operations Joe Quinn, Chief Information Officer Scott Bedows, and Warehouse Manager Brooke Randall all testified that Jones made both statements. However, in reviewing their testimony, their versions varied slightly in both content and context. Joe Willems testified:

> Mr. Jones started out by talking about some payroll issues and some opportunities with not being able to cash checks at banks and how those were ultimately resolved. He rambled on about a few other items related to just general issues that were being addressed and how both sides were working through it. And then seemingly out of nowhere, we – we kind of started to go down a different path. It started to turn more towards this -- "this is completely about the money. We're only here to pay our car notes. You know, I don't -- you know, it -- it doesn't matter if you like Lance or Brooke." And then he proceeded to go into -- so, you know, then it was more around we -- "we need to get this money to take care of our family. You know, if the Company doesn't do what they say they're going to do, 'fuck 'em.'" And then at that point it was, you know, "Continue to get

[5] Respondent argues several of the General Counsel's witnesses should not be credited because they either are related to Jones (Anthony Washington and Gary Finley), or are Union stewards (i.e., Sam Brown, Lamark Thompson, and Ray Lampkins). While such relationships could cause bias, I find that each testified honestly and sincerely, and their testimony was corroborated by other witnesses who are not related to Jones and/or not Union stewards (e.g., Ekunno Thomas and Curtis Vitale).

[6] All but one of the witnesses recalled that Jones used the word "fuck" once during his speech. Dennis Donoaby, a unit employee, recalled Jones used the work "fuck" three times at the end of his speech, but he could not recall specifically what Jones said. He, however, confirmed Jones did not say, "fuck Joe [Willems], fuck Joe [Quinn], and fuck Brooke [Randall]." (Tr. 214-215, 217-218).

> paid, and we do what we need to do." And then that's when I -- I did hear Mr. Jones say, you know, "Fuck Joe, fuck Brooke and fuck Joe," meaning fuck Joe Willems, fuck Brooke Randall, fuck Joe Quinn. "It ain't about them. It's about you and you and your family. It's about getting paid." And again, he reiterated the fact that if they don't do what they say they're going to do, then fuck 'em.

(Tr. 270-271).

Joe Quinn testified:

> So Carl got the attention of the group. He started off basically stating that the reason why he worked for the company was to feed his family. That was his priority, that he needed to pay his car note, pay his bills and provide for his family. And then he talked about an employee that was having an issue getting his paycheck resolved, and went on to tell the employees that that issue had been resolved with the paycheck; next, went into telling the team that there was work that needed to be done, that they needed to do it, to work, and that we needed, you know, basically them to work. And -- and "The Union needs to do what the Union needs to do, and the Company is going to do what the company is going to do. And if the Company doesn't do what the Company is going to do, well, then, fuck 'em." And he went on to say that, you know, he didn't care about them, didn't care about Brooke, and specifically said fuck -- "Fuck Brooke, fuck Joe Willems," used my name, "Fuck Joe Quinn, fuck Lance," who is our supervisor, and "fuck John Becker."

(Tr. 289-290)

Scott Bedows testified:

> So Mr. Jones got up and talked about his -- talked about how, you know, we need to take care of our -- ourselves. We need to take care of our paychecks. We need to take care of our families, that, you know, there's a new company and a new day, and you -- you know, you need to remember that we need to give them a chance, and we need to do the right thing, and we need to be there for the company. He talked about a specific example about an employee's paycheck, who maybe got messed up, and the Company got him the money, and he was able to go to the bank and get his money. I mean, so he went on about some of those types of things. At some point about half -- I guess two-thirds of the way through his conversation, his tone got very agitated. He started talking about the management, and he basically said, "I don't really care about management. Fuck 'em." And it was at that point that he got increasingly agitated and the – the tone shifted, and he said, you know, "It's only about my paycheck, it's only about my money, it's only about my house payment. Fuck Joe, fuck Brooke, fuck Lance, fuck Joe[.]" ….And he kind of continued along those lines of just, you know, "Hey, you know, you all do what you want to do. Whatever you want to do, do it, but fuck management. I don't care."

(Tr. 306-307).

Finally, Brooke Randall testified:

> So Carl starts out talking about a payroll issue with Damon Powers. And to me, it was a rant. It was one of Carl Jones' rants, and I'm like, okay, whatever. Don't know what this has to do with anything we're meeting about, but we're here. And then he goes on to start talking about how he's from the streets and -- and I'm -- you know, what does this have to do with work?
> …
> So he's like "I'm from the streets, and I don't care nothing about Lance or Brooke or Joe or Joe, and I'm coming in here. We're going to come in here. We're going to do these bands, and this is what we're going to do." And I'm, like, why is he doing this? And so he goes, "We're going to come in here, do like we say. We're going to do 20 bands, get it done, and if they don't -- and if they don't do what they say they're going to do, fuck 'em," after he had called us out, the management team out, told them "fuck them."

(Tr. 324-325)

I find the discrepancies in their versions regarding the content and context of what Jones allegedly said calls into question the clarity of their recollections and the veracity of their testimony. Moreover, I find the credibility of Willems and Quinn is directly undermined by the fact that a day after Respondent suspended Jones, they separately emailed statements to Employee Relations Business Partner Stephanie Duffy which contained no mention of Jones saying anything like "fuck Joe [Willems], fuck Joe [Quinn], and fuck Brooke [Randall]." Duffy sent Quinn an email, stating "Isn't part of the incident left off? You told me this morning that Carl said, 'Fuck Joe, Fuck John Becker, Fuck Brooke, Fuck Joe.' I'm not seeing that in your statement here." (G.C. Exh. 5B). Quinn responded to Duffy, "Sorry I did leave out those important details. That statement should have been included." (G.C. Exh. 5C). Then, on March 13, Willems emailed an "addendum" to his statement, in which he noted that "I did hear Carl state 'F*** Joe (Willems), F*** Joe(Quinn), F*** Brooke(Randall), it is about doing it for your family." (G.C. Exh. 3). Respondent contends that these omissions are immaterial because the disputed statement was included in the corrective action form given to Jones on March 9 when he was suspended. While inadvertent omissions certainly can occur, the fact neither included it in his original statement calls into doubt whether the statement was made, and these emails suggest a coordinated effort to provide one consistent version. There is no reference as to whether Randall or Bedows submitted their own statements, so it is unclear whether they provided statements that mentioned the disputed statement Overall, I find the fact that these four witnesses could not provide consistent statements about what was said is telling, considering Respondent relied upon the disputed statement to suspend and discharge Jones.[7]

I am not suggesting Respondent's witnesses knowingly provided false testimony. But I do find that they likely testified more based upon their impressions of what was said, as

[7] On direct examination, Joe Willems testified about the reason for the suspension and discharge:

> Q: Let's start this way. Why was Mr. Jones suspended and/or discharged?
> A: Specifically during a meeting on March 8th, where there was management, employees, executive leaders and other guests in the facility, Carl Jones made reference specifically engaging or encouraging "Fuck Joe Willems," the DCM of the Coca-Cola facility in St. Charles; "Fuck Brooke Randall," the warehouse manager of that the Coca-Cola facility in St. Charles; and "Fuck Joe Quinn," my boss, the Vice-President of Field Operations for the St. Louis market unit.

(Tr. 255; 13-23).

opposed to what actually was said. I credit Jones' testimony that when he spoke to the employees, he said, "Guys, look, we're all one company. We don't have to like Joe, Lance, Brooke, John Becker, but what you do like is to pay your car note, pay your house note, pay your mortgage." Jones said, "Hey, guys, I need you to step up, and Friday I need you to sign up and come in." He later concluded by saying, "Guys, if you come in, do your business, do what you need to do, and if they lie to you and you're still doing 16 hours, fuck 'em. Don't come in on your off day. Don't do any more favors." I find that Respondent's witnesses may have conflated or inferred from this that that Jones was saying, "fuck Joe [Willems], fuck Joe [Quinn], and fuck Brooke [Randall]."

But I do not credit that Jones actually said that, or anything like it. In order for me to credit Quinn, Willems, Randall, and Bedows, I would have to discredit at least 10 other witnesses, including several neutral employee witnesses, who said Jones did not make the disputed statement. And I find no basis to doing so.

The second key credibility dispute is whether Willems asked Jones to speak during this March 8 meeting. Jones and Union steward Sam Brown both testified that Willems asked them if they wanted to speak in support of the plan during the meeting. Willems and Quinn deny this, and they contend that Jones just spoke up as the meeting was ending. I credit Jones and Brown over Willems and Quinn on this point. Willem scheduled the meeting for the purpose of getting third-shift employees to volunteer to work on their day off to help get the company caught up, and he acknowledged that he wanted the Union to support his plan, and that he wanted the Union to be present at the meeting to show its support for the plan. I find that it is far more inherently probable under these circumstances that Willems asked Jones and Brown to speak or, at the very least, if they wanted to speak during this meeting to help get employees to volunteer to work.

The third key credibility dispute is whether Willems said during the April 3 grievance meeting that Jones was being held to a higher standard because he is the chief shop steward. The General Counsel's witnesses (Jones, Lamark Thompson, and Michael Austill) who were present during the meeting confirmed that Willems stated that Jones, as the elected chief shop steward, would be held to higher or different standard. Willems and Supervisor Clemmy Zerrer both testified that Willems did not say this. Willems, however, was more evasive and non-responsive regarding what he actually said. On direct-examination, Willems testified:

> Q: Did you -- did you, Mr. Willems, indicate that you are holding Mr. Jones to a different or a higher standard because of his role as chief shop steward?
> A. I believe my comments that day, that that is a significant misrepresentation. Ultimately, the comments that I made were around my disappointment in Mr. Jones' ability to conduct himself in a professional manner given the situation. Ultimately, as a chief shop steward, I would have anticipated that Carl would have been in many similar situations and would have known how to conduct himself in a professional manner, but in no way do I hold him or any other employee in that facility to a different standard. I think if we would have specifically asked all the people that came on the stand -- just we'll take that away, because that's speculation. At the end of the day, all of my employees are treated the same way, and I have the same expectation for everyone in that facility, regardless of role, title or responsibility.

Then, on cross-examination, Willems testified as follows:

> Q. I want to just pick right up where we leftoff. I -- I don't know that I got a clear answer to that last question. You said what -- what – the testimony we have misconstrued what you said on that day about a different or higher standard. What --what were your exact words?
> A. My exact words were that I was disappointed in Mr. Jones in that he did not meet the expectation of -- that I would have anticipated given his background and -- and circumstances that he's been involved in.

(Tr, 278-279).

Under the circumstances, I credit that Willems stated that Jones, as the elected chief shop steward, was being held to a higher standard, and that Jones failed to meet this higher standard by his statements during the meeting. I further find that Jones' failure to meet this higher standard was a factor in Respondent's decision to suspend and later discharge him.

IV. LEGAL ANALYSIS

A. Did Respondent suspend and later discharge Carl Jones for engaging in protected concerted and union activities, in violation of Section 8(a)(1) and (3) of the Act?

1. Generally

The Complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act when it suspended and later discharged Carl Jones because he engaged in statutorily protected activities. The General Counsel argues that Jones was engaged in protected concerted and union activity when he spoke during the meeting. Respondent contends that Jones was not engaged in statutorily protected activity during the meeting, and that, even if he was found to have been engaged in such activity, he lost the protection of the Act by his profane statements regarding management.

Section 7 provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The Act, therefore, prohibits employers from discriminating against employees by suspending or discharging them because of their union activities and/or for exercising their organization and collective-bargaining rights, including their right to engage in concerted activities for the purpose of mutual aid and protection.

2. Was Carl Jones engaged in statutorily protected activity when he spoke during the March 8 employee meeting?

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 slip op. at 3 (2014). Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*,

268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Supreme Court has observed that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. at 835. The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). In addition, it is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Whittaker Corp*., 289 NLRB 933, 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). The "concertedness" and "mutual aid or protection" elements are analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, supra, slip op. at 3.

The Board has held that an employee who raises and discusses terms and conditions of employment during a meeting conducted by management is engaged in statutorily protected activity. See generally, *Modern Honolulu*, 361 NLRB No. 24 slip op. at 2, 13 (2014) (employee engaged in protected activity at meeting by raising questions about supervisory behavior); *Avery Leasing, Inc.*, 315 NLRB 576, 580 fn. 5 (1994) (an employee who complains to management concerning wages or other terms and conditions of employment in the presence of other employees is engaged in protected concerted activity); and *Enterprise Products*, 264 NLRB 946 (1982) (employee's critical remarks about an employer's plan related to wages, hours, and other terms and conditions of employment found protected and concerted).

In reviewing the evidence, I find Jones was engaged in statutorily protected activity during the March 8 employee meeting. There is no dispute that he spoke up and urged employees to volunteer to work on their day off because it would benefit them financially and it would help the company reduce its backlog, which, in turn, could reduce the amount of overtime employees would need to work moving forward. In addition, because Jones was the chief union steward, and his responsibilities in that role include advocating for unit employees about workplace matters, he was engaged in union activity when he spoke up. *H&M International Transportation, Inc.*, 363 NLRB No. 139, slip op. at 25 (2016), citing *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976).

3. Did Carl Jones lose the protection of the Act when he used profanity during the March 8 employee meeting?

When an employee is disciplined or discharged for conduct that is part of the res gestae of statutorily protected activity, the question is whether the conduct is sufficiently egregious or opprobrious to remove it from the protection of the Act. *Stanford Hotel*, 344 NLFB 344, 358 (2005).[8] The Board recognizes that employees are permitted some leeway for impulsive

[8] The legal framework generally used to evaluate whether an adverse employment action violates Section 8(a)(1) or 8(a)(3)of the Act is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983). Under *Wright Line*, the General Counsel must make an initial showing that the employee's protected activity was a substantial or motivating factor for the employer's adverse employment decision, which requires: (1) the employee engaged in protected concerted activity; (2) the employer had

behavior when engaged in protected activity, because the "protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumer Power Co.*, 282 NLRB 130, 132 (1986). But this leeway is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994). To determine whether an employee loses the Act's protection, the Board balances the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel Co*., 245 NLRB 814 (1979). In assessing whether the employee's conduct removed the protections of the Act, the asserted impropriety "cannot be considered in a vacuum" nor "separated from what led up to it." *NLRB v. Thor Power Tool, Co.*, 351 F.2d 584, 586 (7th Cir. 1965); *Emarco, Inc.*, 284 NLRB 832, 834 (1987).

The first *Atlantic Steel* factor--the place of the discussion—favors protection. In evaluating the place of the discussion, the Board considers the circumstances, such as whether it occurred in the work area or during work time, was observed by other employees or customers, caused a disruption in the employer's operations, and/or undermined workplace discipline. See generally, *Kiewit Power Constructors Co*., 355 NLRB 708 (2010); *Datwyler Rubber & Plastics, Inc*., 350 NLRB 669, 670 (2007); and *Noble Metal Processing, Inc*., 346 NLRB 795, 800 (2006). Jones' statements occurred during a meeting called by the employer, which weighs in favor of protection. *Datwyler Rubber & Plastics, Inc.*, supra. Moreover, I find that Respondent asked Jones to speak at this meeting in the hopes that he would help motivate employees to volunteer to come in on their day off to work. There were employees and managers present, but there were no customers or non-employees present. Moreover, the meeting occurred prior to start of the third shift, so there was no disruption to production. Id. Finally, there is no evidence that Jones' statements undermined workplace discipline.

The second *Atlantic Steel* factor--the subject matter of the comments—also favors protection. As stated above, Jones was asking the third-shift employees to come into work on their off day to help themselves financially and to help the get the company caught up with their orders. Jones added that if the company got caught up, employees would not need to continue working excessive overtime. Urging employees to collectively take action that would mutually benefit them, their coworkers, and the company clearly is protected.

The third *Atlantic Steel* factor--the nature of the outburst—also favors protection. In assessing whether an employee's protected, concerted activity loses the protection of the Act, the Board has held that a line "is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973). The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening or

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knowledge of that activity, and (3) the employer had animus towards the protected activity. If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove that it would have taken the same action in the absence of the employee's protected activity. However, the *Wright Line* framework is not applied where, as here, there is no dispute that the employer took the adverse action in response to conduct that occurred while the employee was engaged in protected activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

so opprobrious to lose the protection of the Act. *Plaza Auto Center, Inc.*, 360 NLRB 972, 975 (2014). As previously stated, Respondent asked Jones to attend and speak at this meeting in the hopes that he would help get the employees to volunteer to work. I find that Jones did exactly that. He concluded by saying, "Guys, if you come in, do your business, do what you need to do, and if they lie to you and you're still doing 16 hours, fuck 'em. Don't come in on your off day. Don't do any more favors." I do not credit that he identified managers by name and said fuck them, as well.

Respondent contends that Jones was attempting to incite the employees against management. I reject that contention. Jones spoke to the group the way he normally spoke to them to motivate them. I do not find Jones' use of profanity, which is how Jones "talked to his guys", was so excessive, offensive, or violent to cause him to lose the protection of the Act. There is no dispute that profanity was common in the warehouse, including by and around members of management. In fact, Willems used profanity during his speech when he told employees that he knew that they were all "fucking tired." Additionally, I find that after Jones made his statement, and Brooke Randall was upset, Jones apologized if he offended anyone. Under these circumstances, I find that the nature of Jones' outburst was not so opprobrious to cause him to lose the protection of the Act. *Kiewit Power Constructors, Co.*, supra at 710 (that employee's conduct consisted of a brief verbal outburst weighs in favor of protection).[9]

The fourth *Atlantic Steel* factor does not favor protection, because Jones' statement was not provoked by the employer's misconduct or unfair labor practice. *Tampa Tribune*, supra at 1325, citing *Verizon Wireless*, 349 NLRB 640 (2007).

In summary, three of the four *Atlantic Steel* factors favor that Jones did not lose the protection of the Act. Accordingly, I conclude that Respondent suspended and later discharged Jones because he engaged in protected concerted and union activities during the March 8 meeting, in violation of Section 8(a)(1) and (3) of the Act.[10]

[9] There are examples in which the Board has found offensive and profane language directed to or about management to not lose the protection of the Act. See *Pier Sixty*, 362 NLRB No. 59, slip op. at 2 (2015) (employee's Facebook post that the assistant director "is such a nasty mother fucker. . . fuck his mother and his entire fucking family" did not lose the protection of the Act); *Alcoa, Inc.*, 352 NLRB 1222, 1225 (2008)(employee acting in his union representational capacity, who a called a supervisor an "egotistical fucker," did not lose the protection of the Act); *Tampa Tribune*, 351 NLRB 1324 (2007)(employee did not lose the protection of the Act when he told two supervisors that the employer's vice president was a "stupid fucking moron"); *Union Carbide Corp.*, 331 NLRB 356, 359 (2000), enfd. 25 Fed. Appx. 87 (4th Cir. 2001) (employee who called manager a "fucking liar" was found not so "out of line" as to remove him from the protection of the Act); *Great Dane Trailers*, 293 NLRB 384, 384, 393 (1989) (employee did not lose protection of the Act for calling his foreman a "fucked up foreman" on the shop floor after employee's requests for assistance were denied); and *Leasco, Inc.*, 289 NLRB 549 fn.1 (1988)(phrase "I'm kicking your ass right now" found to be a colloquialism, and not an actual threat, and thus did not find the use of that phrase removed the Act's protection). Cf. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005) (no protection for sustained, profane, ad hominem attack on supervisor in work area during work time).

[10] Certain witnesses, including Union stewards, provided anecdotal testimony of situations in which other employees directed profanity towards a manager or supervisor, and none were discharged. Respondent presented no evidence of any employee who worked at the St. Charles distribution center and warehouse that was discharged for using profanity.

B. Did Respondent violate Section 8(a)(1) of the Act by maintaining an overly broad rule (C-20) and interpreting that rule to prohibit Carl Jones from engaging in statutorily protected activities?

The Complaint alleges the C-20 is an overly broad rule and Respondent interpreted that rule to prohibit Carl Jones from engaging in statutorily protected activities, in violation of Section 8(a)(1) and (3) of the Act. It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following: (i) employees would "reasonably construe the rule's language" to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that rules must be afforded a "reasonable" interpretation, without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. There is no dispute Respondent applied C-20 to suspend and later discharge Jones for what he said during the March 8 meeting, which I have found to be protected, concerted and union activity.

The Complaint alleges that Respondent's maintenance of C-20 violates Section 8(a)(1) of the Act. The General Counsel contends that the rule is unlawfully overbroad and vague, and reasonably could be interpreted as prohibiting employees from engaging in protected activity. The Board has held that it is unlawful for an employer to broadly prohibit employees from making derogatory, disparaging, or negative statements about the company, its managers, or its employees. See *William Beaumont Hospital,* 363 NLRB No. 162, slip op. at 2 (2016)(rule that prohibits "negative or disparaging comments about the ...professional capabilities or an employee or physician to employees, physicians, patients, or visitors" was unlawful because it would "reasonably be construed to prohibit expressions of concerns over working conditions"); *Quicken Loans, Inc.*, 361 NLRB No. 94 (2014), affirming 359 NLRB 1201 (2013) ("non-disparagement" provision in an employment agreement which provided employees will not "publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image" was overbroad and unlawful); *Hills & Dales General Hospital*, 360 NLRB 611 (2014)(rule prohibiting ""negative comments about fellow team members" and "negativity" to be overly broad and unlawful); *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011) (rule that prohibited "any type of negative energy or attitudes" found unlawful); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (a rule prohibiting "[n]egative conversations about associates [employees] and/or managers" found unlawful). Similar to these cases, C-20 contains language prohibiting misconduct which "casts discredit upon the company's reputation and/or image" and that included "rudeness" and "criticizing or degrading the company."

The Board also has held rules containing broad and ambiguous terms, without any defining or explanatory language, may violate the Act. See *Valley Health Systems, LLC*, 363 NLRB No. 178, slip op. at 2 (2016) (the Board found a prohibition against "offensive" conduct that did not "appear among a list of serious forms of objectively clear misconduct that would help employees understand its contours," to be overly broad and unlawful). The Board has found that employees "should not have to decide at their own peril what [conduct] is ...subject to such a prohibition." Id.; citing *Hyundai America Shipping Agency, Inc.,* 357 NLRB 860, 871 (2011), enfd. in part and reversed in part, 805 F.3d 309 (D.C. Cir. 2015). See e.g*., First Transit, Inc.*, 360 NLRB 619, 621 (2014) (finding a rule prohibiting "inappropriate attitude or behavior...to

other employees" unlawful due to its "patent ambiguity"); and *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (2014) (rule prohibiting "insubordination or other disrespectful conduct" unlawful as phrase "disrespectful conduct" is so ambiguous that employees would reasonably read the rule as encompassing Section 7 activity). I find the terms "casts discredit upon the company's reputation and/or image" and that included "rudeness" and "criticizing or degrading the company." are broad and ambiguous, and, without defining or explanatory language, could reasonably be interpreted as restricting protected activity. As a result, I find that the maintenance of C-20 violates Section 8(a)(1) of the Act.[11]

The Complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act when it suspended and later discharged Jones because it interpreted C-20 to prohibit him from engaging in protected concerted and union activities. Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc.*, 357 NLRB 409, 410-413 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004). An employer can avoid liability for discipline imposed pursuant to an overbroad rule, if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. The employer bears the burden of asserting this affirmative defense and establishing that the employee's interference with production was the actual reason for the discipline. That burden only can be met when an employer demonstrates that it contemporaneously cited the employee's interference with production as a reason for the discipline, not simply the violation of the overbroad rule.

As previously stated, I find that Jones was engaged in protected, concerted and union activity when he spoke during the March 8 meeting, and he did not lose the protection of the Act by his use of profanity. Respondent has presented no evidence that Jones' statements interfered with his work or that of other employees, or otherwise interfered with the company's operations. On the contrary, Respondent asked Jones to speak to help motivate the employees to volunteer to work on their day off, and Jones was successful in doing so, because after he spoke several employees signed up to work on their day off. Based on this evidence, I find that Respondent violated Section 8(a)(1) and (3) of the Act by interpreting the rule to prohibit Jones from engaging in protected, concerted and union activities.

C. Did Respondent violate Section 8(a)(1) of the Act by stating that Carl Jones was being held to a higher standard because of his position as chief shop steward?

The Complaint alleges that Respondent, through Joe Willems, violated Section 8(a)(1) of the Act when he told employees during the April 3 grievance meeting that Jones was being held to a higher standard of conduct because of his position as chief shop steward. In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707-709 (1983), the Supreme Court held that, in the absence of a contractual waiver, an employer cannot impose a higher duty on, or issue harsher discipline to, union officials regarding their conduct. Therefore, absent a waiver, statements indicating that union officials are being held to a higher standard are unlawful.

[11] An employer may implement and maintain a rule restricting protected activity, so long as there is an overriding interest in doing so. See generally, *Flagstaff Medical Center*, 357 NLRB 659, 662-663 (2011), review granted in part and enfd. in part 715 F.3d 928 (D.C. Cir. 2013). However, in this case, Respondent articulated no weighty or overriding interest for the rule.

In its post-hearing brief, the only defense Respondent raises to this allegation is that Willems never said that Jones was being held to a higher or different standard *because of* his position as chief shop steward. Rather, Willems said that, given Jones' position, Willems was particularly disappointed in Jones' misconduct and that he should have "known better" than to make statements to incite a group of employees in the presence of management. As I previously stated, I do not credit Willems. Rather, I find that he did say to employees during the grievance meeting that Jones' conduct was inappropriate and that, as the elected chief shop steward, he was held to a higher standard of conduct. Furthermore, I do not find Jones' statements were intended to incite the employees to violate the contract or the law. See *Indiana & Michigan Electric Co.*, 273 NLRB 1540 (1985). As a result, I find that Willems statement violated Section 8(a)(1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent, Heartland Coca-Cola Bottling Company, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7) of the Act.

2. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by suspending and later discharging employee Carl Jones, because of he engaged in protected concerted and union activities, and in violation of Section 8(a)(1) and (3) of the Act for also suspending and later discharging Jones on the basis of, and pursuant to, an unlawfully maintained and enforced rule (C-20).

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by maintaining at its St. Charles, Missouri facility rule C-20, which prohibits misconduct which casts discredit upon the company's reputation and/or image while on or off company time and/or in company uniform will not be tolerated. This would include, but not limited to, rudeness, disrespect to customers, and criticizing or degrading the company, its product or products before customers.

4. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by stating that Carl Jones was being held to a higher standard because of his position as chief shop steward.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily suspended and discharged Carl Jones, shall be ordered to offer him reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him. As this violation involves a cessation of employment, the make whole remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as

prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Jones for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 14 a report allocating the backpay award to the appropriate calendar year for said employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall also compensate Jones for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent shall also be ordered to expunge from its files any and all references to the discriminatory and unlawful suspension and discharge of Jones, and notify him in writing that this has been done and that evidence of the discriminatory and unlawful action will not be used against him in any way.

The General Counsel further requests that I order Jones be reimbursed for ""consequential economic harm" incurred by him as a result of Respondent's unlawful conduct. However, the Board does not traditionally provide remedies for consequential economic harm in its make-whole orders. See e.g. Operating Engineers Local 513 (Long Const. Co.), 145 NLRB 554 (1963). And I am obligated to follow existing Board precedent in resolving the issues present in this case. *Pathmark Stores, Inc*., 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Accordingly, I deny the General Counsel's request for this additional remedy. *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016).

Respondent shall be ordered to revise or rescind rule C-20. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to unlawful rules. See *Hills & Dales General Hospital*, supra, slip op. at 2-3; see also *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As stated therein, the Respondent may comply with the order of rescission by reprinting the rule without the unlawful language or, in order to save the expense of reprinting the whole policy manual, it may supply its employees with policy handbook inserts stating that the unlawful rules have been rescinded or with lawfully worded policies on adhesive backing that will correct or cover the unlawful portions of the policies or the unlawfully broad portions of the policies, until it republishes the policies without the unlawful provisions. Any copies of the policies that include the unlawful rules must include the inserts before being distributed to employees. *Hills & Dales General Hospital*, supra, slip op. at 3; *Guardsmark, LLC*, supra at 812 fn. 8; See also *Bettie Page Clothing*, 359 NLRB 777, 778-779 (2013).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[12]

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER[13]

Respondent, Heartland Coca-Cola Bottling Company, LLC, St. Charles, Missouri, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or enforcing rules or policies that prohibits misconduct which casts discredit upon the company's reputation and/or image while on or off company time and/or in company uniform will not be tolerated. This would include, but not limited to, rudeness, disrespect to customers, and criticizing or degrading the company, its product or products before customers.

(b) Suspending, discharging or otherwise discriminating against employees because they engage in union or protected concerted activities;

(c) Suspending, discharging, or otherwise discriminating against employees pursuant to or on the basis of unlawful or overly broad employee rules or policies;

(d) Making statements that individuals are being held to a higher standard because they are Union stewards or officers.

(e) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, revise or rescind employee rules or policies that are overbroad, ambiguous, or otherwise limit employees' rights under the National Labor Relations Act insofar as they prohibit misconduct which casts discredit upon the company's reputation and/or image while on or off company time and/or in company uniform will not be tolerated, including, but not limited to, rudeness, disrespect to customers, and criticizing or degrading the company, its product or products before customers.

(b) Furnish all current employees with inserts that advise employees that the above-mentioned unlawful rule has been rescinded, provide employees with the language of revised lawful rule on adhesive backing that will cover the above-mentioned policies; or (3) publish and distribute to employees policies that do not contain the above-mentioned unlawful rule, or which contain or provide the language of a lawful rule.

(c) Within 14 days from the date of this Order, offer Carl Jones full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Make whole Carl Jones for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(e) Compensate Carl Jones for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for Carl Jones.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Carl Jones, and within 3 days thereafter, notify said employee in writing that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in St. Charles, Missouri, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 2017.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 23, 2017.

Andrew S. Gollin
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain and/or enforce rules or policies that prohibit misconduct which casts discredit upon the company's reputation and/or image while on or off company time and/or in company uniform will not be tolerated, including, but not limited to, rudeness, disrespect to customers, and criticizing or degrading the company, its product or products before customers.

WE WILL NOT discharge or otherwise discriminate against you on the basis of, or pursuant to, unlawful, overly broad, or ambiguous employee rules or policies.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union or protected concerted activities.

WE WILL NOT make statements that individuals are being held to a higher standard because they are Union stewards or officers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, which are listed above.

WE WILL, within 14 days of the Board's Order, revise or rescind employee rules or policies that are unlawful, overbroad, ambiguous, or otherwise limit your rights under the National Labor Relations Act insofar as they, like C-20, prohibit misconduct which casts discredit upon the company's reputation and/or image while on or off company time and/or in company uniform will not be tolerated, including, but not limited to, rudeness, disrespect to customers, and criticizing or degrading the company, its product or products before customers; and WE WILL advise employees in writing that we have done so and that the unlawful rules or policies will no longer be enforced.

WE WILL furnish you with inserts for your current employee conduct policies that: (1) advise you that the above-mentioned rule has been rescinded, or (2) provide you with language of lawful or revised policies on adhesive backing that will cover the above-mentioned unlawful policies; or WE WILL publish and distribute to you revised employee conduct rules or policies that do not contain the above-mentioned unlawful rules, or provide the language of the lawful policies or rules.

WE WILL, within 14 days from the date of the Board's Order, offer Carl Jones full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Carl Jones whole for any loss of earnings and other benefits resulting from his unlawful suspension and discharge, less any net interim earnings, plus interest, including any search-for-work and interim employment expenses he incurred as a result of his unlawful discharge.

WE WILL compensate Carl Jones for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for Carl Jones.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful suspension and/or discharge of Carl Jones, and WE WILL, within 3 days thereafter, notify said employee in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL NOT discipline or suspend you because of your union membership or support or because you engaged in union activities.

HEARTLAND COCA-COLA BOTTLING COMPANY, LLC
(Employer)

DATED: _____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

1222 Spruce Street, Room 8.302, St. Louis, MO 63103-2829
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-195320 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 449-7493.